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HAND DELIVERY

September 13, 1985

Joseph J.C. Donovan, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, PA 19107

Re: Tyson's Lagoon

Dear Joe:

This relates to the Draft Administrative Order on Consent for a Remedial Investigation/Feasibility Study (RI/FS) at off-site areas in the vicinity of Tyson's Lagoon.

The most important issue unresolved between Ciba-Geigy Corporation and the Environmental Protection Agency concerns Paragraph VI(G). This paragraph, as drafted by EPA, imposes the obligation on the respondent to implement "any additional tasks which EPA determines are necessary" subject only to the "dispute resolution section" (Section XII of the Consent Order). The basis for our objection is twofold:

1. The phrase "any additional tasks which EPA determines are necessary" is excessively broad and vague and is not limited to specific follow-up work related to the Work Plan for the RI/FS in question;

2. Although the section does refer to the dispute resolution clause, it does not grant to the respondent a stay of his obligation to perform the additional work during the pendency of the appeal proceeding. Obviously, this renders the dispute resolution a nullity since the respondent would have to perform the objectionable work when EPA requested it. Thus, we read Paragraph VI(G) as essentially a "blank check" to EPA to specify whatever additional tasks it may desire in the future at our expense regardless of their technical merit or financial impact.

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As a final attempt to resolve this issue, we are proposing the following language in place of Paragraph VI(G):

"EPA may determine that tasks in addition to those required by the Consent Order are necessary to complete the Studies. In this event, EPA shall give notice in writing to the Respondent of the scope of any such additional work determined by EPA to be necessary to complete the RI/FS studies performed pursuant to this Consent Order. In accordance with the Dispute Resolution section of this Consent Order (Paragraph XII), the Respondent shall have a period of 14 days from receipt of the EPA notice within which to submit written objections to the performance of the additional work. There shall be an additional 14-day period following receipt by EPA of the notice of objection from the Respondent within which the parties shall meet and discuss the scope of additional work in an attempt to reach agreement. If agreement cannot be reached on this issue within the 14-day period, EPA shall provide a written statement of its decision to the Respondent, which shall be deemed a final agency action for the purposes of judicial review. Notwithstanding any other provision of this Consent Order, the Respondent shall not be deemed out of compliance with this Consent Order during the pendency of this Paragraph and Paragraph XII of this Consent Order, including any proceeding for judicial review. In the event of a written request by EPA for additional work by the Respondent, the Respondent and its consultant shall not perform any tasks under this Order which would prevent or interfere with the performance of such additional work as specified by EPA."

We also suggest that EPA consider the possibility of arbitration of any disputes under Paragraphs VI(G) and XII by an arbitrator selected by the parties, such as Clean Sites, Inc. or the American Arbitration Association. Arbitration is particularly appropriate for a technical dispute regarding additional work; a decision would be rendered more expeditiously by an arbitrator than a court.

I look forward to hearing from you with respect to this language. I did speak with Mike Kilpatrick of CERCLA Enforcement, EPA Headquarters, with respect to this provision, and I suggested that he contact you as the lead attorney on the case.

Sincerely yours,

Bradford F. Whitman

BFW/kfg

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